

On the treatment of the sui generis database rights in Version 3.0 of the Creative Commons licenses.

Background:

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (the "Database Directive") created a new basis for the protection of databases ("sui generis database protection") not previously recognized under copyright law. The database directive has by now been implemented by the 25 member states of the EU (plus some of the countries such as Norway that are part of the European Economic Area - EEA). Outside of Europe there is no sui generis protection of Databases. In some countries (for example Germany) the database directive has been implemented as part of the national copyright act, while others (such as the Netherlands) have chosen to implement via a separate act (in this case the database act).

The lawmakers of the European Union decided that in order to provide greater protection to collections of information they should have a unified legal protection for databases. To this end, they created a sui generis right called database right. The database right lasts for 15 years under this regime, but can be extended if the database is updated. Database rights prevent copying of substantial parts of a database (including frequent extraction of insubstantial parts). However unlike copyright the protection of the database right is not over the form of expression of information but of the information itself [source: en.wikipedia.org/wiki/Database_rights].

Prior to Version 3.0, some localized and translated versions of the Creative Commons licenses (Belgium, Netherlands, France and Germany) contained references to national legislation passed pursuant to the Database Directive, by defining a "work" to include databases protected by these laws. Most other European CC licenses simply did not mention database rights at all. This situation was identified as one of the issues in need of harmonization as part of the upgrade cycle to version 3.0. As this problem was identified at a relatively late point in the upgrade cycle it was not included in the public consultation process that preceded the launch of the 3.0 licenses.

At this point some project leads have expressed the view that the EU sui generis rights may be so broad that the CC licenses are not complete (or exercisable) in practical applications (particularly in internet collections) without addressing them (without this the licensor of these works would still hold some exclusive rights in the works they intended to license).

On the other hand, database licensing is particularly problematic in pure data contexts (i.e., beyond the scope of copyright), and in the past, CC (through Science Commons) had decided to refrain from creating data licenses. CC licenses that include the sui generis database rights are especially problematic from the perspective of Science Commons as they pose the danger that the sui generis protection of databases could 'be exported' to a jurisdiction without sui generis protection of databases through the use of CC licenses for works that qualify for protection under the various national implementations of the Database Directive. From the perspective of Science Commons this made CC licenses that define 'works' to include databases protected by the national implementations of the Database Directive unsuitable for use in the scientific context.

Solution:

This meant that in order for CC licenses to be fully functional in European jurisdictions the database rights need to be included, while at the same time the inclusion of these rights disqualified them for use in scientific context. In order to overcome this blockade three principles have been established:

1. **Existing Legislation:** Sui generis database rights should only be included in localizations where the country has enacted legislation to implement database protection.
2. **Geographic Boundary:** CC licenses that define 'works' to include databases protected by the national implementations of the Database Directive should have territorial limitations regarding these rights.
3. **Unconditional Waiver:** Those CC licenses that define 'works' to include databases protected by the national implementations of the Database Directive should also waive the rights obtained under the sui generis right (i.e not impose any of the CC license limitations or obligations (BY-SA-ND-NC). In other words, the sui generis license should not extend the restrictions of the CC license conditions to things (facts, ideas, information, etc.) not protected by copyright.

As a result of consultations held between Creative Commons, Science Commons and European CC project leads during the iSummit in Dubrovnik, it was agreed to harmonize the treatment of sui generis database protection along the above general principles.

The goal of this proposal is not to expand the scope of protection for works under CC licenses, but to harmonize the Creative Commons licenses across jurisdictions by waiving these protections to the extent that they provide broader protections than otherwise available under general copyright laws (without the sui generis database protection).

The waiver also clarifies that restrictions and obligations such as attribution, non-commercial, no-derivatives, and share-alike are not applicable to works, or to the exercise of particular rights, that are only protected by virtue of sui generis database protection. In other words, the only basis for such restrictions and obligations will continue to be traditional copyright principles.

Implementation:

In the legal code of the licenses this is implemented in three different places (the examples below show the English retranslation from the Dutch 3.0 licenses):

1. **Inclusion of the sui generis database rights in the definition of work** (section 1 of the licenses). This section also contains wording that implements the above mentioned territorial limitation:

Work: the work protected by copyright law that is offered under the terms of this license. For the application of this license a work must also be taken to mean a phonogram, a videogram or a (broadcast)programme within the meaning of the Neighboring Rights Act and a database within the meaning of the Databank Act, provided that such phonogram, videogram, (broadcast)programme or database is protected by applicable law in Your jurisdiction."

2. **Unconditional waiver of the of the sui generis database rights** under the national law implementing the European Database Directive at the end of section 3 of the licenses:

Where the licensor is the owner of the sui generis database rights under the national law implementing the European Database Directive, the licensor will waive this right.

3. **Clarification of this waiver** in section 4 (directly after the subsections covering the restrictions (SA, BY, NC) but above the subsections dealing with moral rights and collecting societies/ compulsory licensing schemes:

For the avoidance of doubt: The restrictions mentioned above (4(a) and 4(b)) do not apply to those parts of the work considered to fall within the definition of a "work" under this license exclusively because they meet the criteria of the sui generis database right under the national law implementing the European Database Directive.